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No. 87-1853

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LAURITZEN ET UX.,
INDIVIDUALLY AND DOING BUSINESS AS
LAURITZEN FARMS, PETITIONERS

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the undisputed material facts concerning petitioners' commercial farming operation establish that the migrant farm laborers who harvest petitioners' annual pickle crop are economically dependent on petitioners and hence are, as a matter of law, employees under the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. IV) 201 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-37a) is reported at 835 F.2d 1529. The opinions of the district court (Pet. App. 45a-53a, 39a-44a) are reported at 624 F. Supp. 966 and 649 F. Supp. 16.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on December 15, 1987. A petition for rehearing was denied on February 8, 1988 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 9, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Michael and Marilyn Lauritzen and their corporation, Lauritzen Farms, are engaged in a commercial farming operation in Wisconsin (Pet. App. 41a). Among the crops they produce are cucumbers ("pickles") intended for the pickle-processing market (*id.* at 60a). Petitioners plant between 100 and 330 acres of pickles annually, depending on the distribution agreements they execute with various pickle processors at the beginning of each agricultural season (*id.* at 5a, 60a). In relevant part, those agreements establish the selling prices of petitioners' pickles (*id.* at 60a).

Petitioners have sole responsibility for cultivation of their pickle crop. They determine the acreage to be devoted to pickles, prepare the fields, plant the seeds, apply fertilizer, insecticides, and herbicides, and irrigate the crop as necessary (Pet. App. 6a, 46a, 61a). Unlike many other crops, the pickle crop is, of necessity, hand-harvested to maximize yield (*id.* at 60a).[1] To that end, each year petitioners retain 40 or more migrant families to perform the discrete task of harvesting the pickle crop (*id.* at 42a). The families travel to petitioners' farms from throughout the United States and, during the harvest season, live in housing provided, at no charge, by petitioners (*id.* at 5a, 47a). Some of the migrant families have worked for petitioners for six or seven years (*id.* at 47a), with year-to-year turnover averaging 20% and the average tenure of each family being three to four years (*id.* at 80a).

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[1] Routine machine harvesting, though feasible, is not economically practical, as it destroys the vines and is not selective regarding size and grade of pickle (Pet. App. 8a, 80a). As petitioner Michael Lauritzen himself put it, "[p]ickles grown for the process market are, of necessity, hand harvested" (*id.* at 60a).

Each migrant family works on a single plot of land, which, if possible, is assigned in accordance with the family's preference (Pet. App. 7a-62a). The migrant families have exclusive responsibility for harvesting their individual plots and determining which family members will work, the frequency of pickings, and their own working hours (*id.* at 7a, 46a). Petitioners visit the fields once or twice weekly and retain full responsibility for irrigation and application of pesticides, but they do not directly supervise the harvest (*id.* at 8a, 46a, 72a).

The process of harvesting pickles is simple: the pickles are pulled from the vine (Pet. App. 8a, 46a, 56a). Though workers become more proficient with experience, for example, in selecting cucumbers of an appropriate size, the basic task is simple enough that even young children can learn it within a few minutes (*id.* at 8a, 46a). Indeed, young children work in petitioners' fields alongside their parents (*id.* at 5a, 20a).

As they pick the pickles, the laborers place them in pails, which are then emptied into sacks (Pet. App. 7a). The only equipment the laborers supply to harvest the pickles is their work gloves; petitioners supply the pails and sacks (*id.* at 16a, 47a). At the end of each day, a family member transports the sacks, in a truck owned by petitioners, to a sorting or grading facility (also owned by petitioners), receiving, in turn, a receipt that reflects the family's pickle harvest for that day (*id.* at 7a, 16a, 46a-47a).

The migrant families' compensation is based on proceeds from the sales of pickles they harvest (Pet. App. 6a, 48a). The families play no role in determining the selling price of pickles or in selling and/or distributing them (*id.* at 47a). Rather, all matters related to sales and distribution are fixed by the pre-season agreements between petitioners and the processors (Pet. App. 6a, 47a). For several

years, the petitioners have set the families' compensation at one-half of the sales proceeds from pickles they have harvested, with an incremental increase at the season's end for those families that remain to complete the harvest (*id.* at 6a, 48a, 61a). Since pickle prices vary by grade, a family's earnings may depend, in some measure, on the family's proficiency in selecting the pickles to pick (*id.* at 7a-8a).

Some of petitioners' compensation arrangements with migrants are written, though others are oral (Pet. App. 64a). Petitioners and all the migrants, however, have also executed the form "Migrant Work Agreements" required by Wisconsin law (*id.* at 6a, 64a). Those agreements set forth the same pay scale currently used by petitioners, but they also guarantee payment of the minimum wage (*id.* at 6a). The Wisconsin Migrant Law, Wis. Stat. Ann. §§ 103.90-103.97 (West 1988), invalidates private contractual agreements that attempt to convert migrant workers from employees into independent contractors (*id.* at 6a). Petitioners assert that the Migrant Work Agreements do not reflect their actual relationships with their migrant laborers, and they do not consider themselves bound by those agreements (*id.* at 64a-65a; see also *id.* at 74a-75a).

For several years, petitioners have refused to maintain records reflecting hours worked by their migrant laborers and the names and ages or birth dates of migrant family members engaged in harvesting the pickle crop (Pet. App. 42a). They have also refused to guarantee payment of the minimum wage to their migrant laborers (*ibid.*) or to prohibit children under the age of twelve from working in the fields (*id.* at 42a-43a).

2. In 1984, the Secretary of Labor initiated proceedings in district court to enjoin petitioners' alleged minimum wage, child labor, and recordkeeping violations of the Fair Labor Standards Act of 1938 (FLSA), 29

U.S.C. (& Supp. IV) 201 *et seq.* (Pet. App. 4a). After discovery, the Secretary moved for partial summary judgment, arguing that the migrant pickle pickers are petitioners' employees, and thus covered by the FLSA, rather than independent contractors, as petitioners contended (*id.* at 4a, 45a).[2]

The district court agreed with the Secretary that the migrants' employment status could be resolved on summary judgment because the "material facts * * * [we]re largely undisputed," making the workers' employment status "fundamentally a question of law, highly appropriate for a decision on summary judgment" (Pet. App. 45a, 49a). The court then reviewed the undisputed material facts under the multi-factor test for employment status derived from *United States* v. *Silk*, 331 U.S. 704, 716 (1947) (Pet. App. 49a-50a). The court identified six specific factors for consideration but stressed that no factor is dispositive and all "must be weighed * * * to decide the economic realities," with the central consideration being "whether the worker is economically dependent upon the business to whom he renders service" (*id.* at 50a).[3]

Applying the specific criteria to the material facts, the court found, first, that "the workers have little control

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[2] The Secretary's motion was supported by depositions of migrants who had worked for petitioners (Pet. App. 4a). Petitioners opposed the motion, supporting their opposition with an affidavit by petitioner Michael Lauritzen (*id.* at 59a-65a) and one signed collectively by four migrants previously deposed by the Secretary (*id.* at 54a-58a).

[3] The criteria identified by the court were control over work performance; the workers' opportunities for profit or loss depending on exercise of management skills; their investment in equipment; skills required to perform the pickle-picking function; permanence of the working relationship; and whether the service rendered by the migrants is an integral part of petitioners' business (Pet. App. 49a-50a).

over the labor process," since they play no role in determining how "seed is planted, fertilized, irrigated, or dusted"; they are "supervised, however minimally, by" petitioners; and they may be discharged by petitioners (Pet. App. 50a). Determination of their own working hours does not signify control, because "[t]he crop itself fundamentally determines" those hours (*ibid.*). Second, they "have little opportunity for profit or loss" based on managerial skills, because the "return on [their own] labor" is "wages[,] not profit," and "pay[ing] for their own transportation * * * and * * * risk[ing] a bad harvest" are not "investment-related risk[s] * * * related to * * * managerial skills" (*id.* at 50a-51a).

Third, the migrants' only investment "in equipment or material[s]" is "transportation and gloves," while "[e]verything else, from housing to sacks, is provided by" petitioners (Pet. App. 51a). Fourth, "little skill is required" for their jobs since it does not take "a great deal of skill to learn" the basic process of picking pickles, and increased proficiency with greater experience "occurs in almost all jobs" (*ibid.*). Fifth, although "the migrant workers do not have a permanent relationship with" petitioners, "[m]igrant workers are by definition temporary" though "many return [to petitioners' farm] from year to year" (*ibid.*). Finally, "the service rendered by the migrant workers is an integral part of [petitioners'] business" because without them, petitioners' "crops would rot on the vine" (*id.* at 52a).

Weighing all these factors, the court concluded that "[t]he economic realities * * * make the [workers] completely dependent upon" petitioners, who plant and care for the crops, determine the selling price, and provide the workers with housing (Pet. App. 53a). The district court therefore granted the Secretary partial summary judg-

ment, holding that the migrant workers are employees and covered by the FLSA (*ibid.*).[4]

The court subsequently granted the Secretary's motion for summary judgment on all remaining issues and enjoined petitioners from future FLSA violations. The court found that the undisputed facts, taken principally from the deposition of petitioner Michael Lauritzen, established that petitioners had refused to keep records relating to the names, ages, and work hours of their migrant employees; had refused to determine whether young children were working in the fields or to prohibit them from working; and had refused to guarantee payment of the minimum wage to the migrants (Pet. App. 42a-43a). In light of petitioner's further deposition testimony revealing that he did "not intend to comply with the [Fair Labor Standards] Act" in the future (*id.* at 44a), the court found it had "little choice * * * but to enjoin [petitioners] from future violations" (*ibid.*).[5]

3. The court of appeals affirmed. The court first agreed that disposition by summary judgment of the employment status issue was appropriate, noting that "a minor factual dispute does not preclude summary judgment," but rather that the "disputed facts must be 'outcome determinative' " (Pet. App. 10a). Here the migrants'

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[4] The court noted the many decisions holding migrant farm workers to be employees and the contrary result in *Donovan* v. *Brandel*, 736 F.2d 1114 (6th Cir. 1984), which it declined to follow because *Brandel* "disregarded the economic reality of migrant cucumber pickers" (Pet. App. 53a).

[5] The court simultaneously denied petitioners' motion for relief from judgment, which was accompanied by affidavits by Michael Lauritzen and several migrants (Pet. App. 76a-80a, 66a-75a), because it demonstrated no "exceptional circumstances" but was "merely a repetition of arguments previously considered" (*id.* at 40a). The Secretary had earlier dropped the claim for back wages (*id.* at 41a).

affidavits relied on by petitioners had "create[d] no material factual issues" (*id.* at 9a), since they "did not dispute the basic factual background" recounted by the court, but simply "allege[d] in conclusory language" that the relationship with petitioner was " 'that of an independent * * * contractor and not one of an employee' " (*ibid.*). Nor had petitioner Michael Lauritzen's affidavits demonstrated a dispute as to material facts, since "[n]othing in [those] affidavit[s] differs in any substantial way from the trial court's view of the facts" (*ibid.*).

The court of appeals also agreed with the district court's description of the controlling criteria (Pet. App. 11a-12a) and with the court's application of the criteria to the facts (*id.* at 13a-20a). On "control," the court reasoned that petitioners' "pervasive control over the [pickle-farming] operation as a whole" was dispositive, since the "right to control applies to the entire * * * operation, not just the details of harvesting" (*id.* at 15a). As to "profit and loss," the court acknowledged that the migrants' "profit opportunity may depend in part on how good a pickle picker is," but the court relied on the migrants' lack of a corresponding possibility for loss since the migrants "have no investment to lose" and any "reduction in earnings" due to a bad harvest "is a loss of wages, and not of an investment" (*id.* at 16a). Similarly, the workers' "capital investment" was negligible since they provide only their own gloves, which are not "a capital investment," and " '[e]verything else * * * [was] supplied by' " petitioners (*ibid.* (citation omitted)). The relative difference in investment was significant, because the "workers' disproportionately small stake * * * indicat[ed] that their work is not independent of" petitioners (*id.* at 17a).

With respect to the migrants' "skills," the court acknowledged that workers develop "some specialized skill * * * to recognize which pickles to pick when" (Pet. App.

17a). The court observed, however, that "this development of occupational skills is no different from what any good employee in any line of work must do" and does "not change the nature of their employment relationship" (*ibid.*). On "permanency," the court concluded that the seasonal nature of the migrants' employment is insignificant since "seasonal businesses necessarily hire only seasonal employees," and the relationship here "is permanent and exclusive for the duration of * * * [the] season," with many families returning year after year (*id.* at 17a-18a). Finally, the court rejected petitioners' argument that the record was insufficient to establish that the migrants' work was an integral part of petitioners' business. "It does not take much of a record," the court reasoned, "to demonstrate that picking the pickles is a necessary and integral part of the pickle business" (*id.* at 18a).

Turning to the overarching consideration of "economic dependence," the court agreed that "[t]he migrants clearly are dependent on the pickle business, and [petitioners], for their continued employment and livelihood" (Pet. App. 19a). Given the migrants' dependence on petitioners' "land, crops, agricultural expertise, equipment and marketing skills," "they are [petitioners'] employees" (*id.* at 20a).[6]

Judge Easterbrook concurred, agreeing that the migrant workers are employees rather than independent contractors. He reached that result under an approach different from the established multi-factor test used by the majority, which, in his view, "begs questions about which aspects

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[6] Like the district court, the court of appeals specifically declined to follow the reasoning and holding of *Donovan* v. *Brandel, supra*, and noted the many decisions finding migrant laborers to be employees (Pet. App. 13a-14a).

of 'economic reality' matter, and why" (Pet. App. 23a). Judge Easterbrook advocated instead a test that he described as closely linked to the FLSA's "purposes" and "functions" (*id.* at 31a-34a). Judge Easterbrook observed that "[t]here are hard cases under the approach I have limned, but this is not one of them" (*id.* at 36a). He concluded that migrant farm workers, who "sell[] nothing but their labor" (*ibid.*), are employees "without regard to the crop and the contract in each case" (*id.* at 36a-37a).

ARGUMENT

The court of appeals, properly applying the legal principles governing motions for summary judgment, correctly held that the migrant laborers who harvest petitioners' pickle crop are employees under the Fair Labor Standards Act. The court's conclusion is admittedly difficult to reconcile with the conclusion reached by the Sixth Circuit on similar facts in *Donovan* v. *Brandel*, 736 F.2d 1114 (1984), but the court below and the Sixth Circuit are in agreement on the controlling legal principles for determining employment status. Any disagreement between them does not amount to the type of conflict warranting review by this Court. Moreover, the court's decision that there were no material factual disputes precluding summary judgment is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The FLSA was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (29 U.S.C. 202(a)). To further its goal of "lessen[ing], so far as * * * practicable, the distribution * * * of goods produced under subnormal labor conditions" (*Rutherford Food Corp.* v. *McComb*,

331 U.S. 722, 727 (1947)), the Act includes definitions of "employee" ("any individual employed by an employer," 29 U.S.C. (& Supp. IV) 203(e)(1)) and "employ" ("to suffer or permit to work," 29 U.S.C. 203(g)) so expansive that a "broader or more comprehensive coverage of employees * * * would be difficult to frame." *United States* v. *Rosenwasser*, 323 U.S. 360, 362 (1945). Because "broad coverage is essential to accomplish the [FLSA's] goal[s]," the Act has consistently been construed " 'liberally to apply to the furthest reaches consistent with congressional direction.' " *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959)). Nevertheless, independent contractors are not covered because the FLSA "is not so broad as to include those 'who * * * might work for their own advantage on the premises of another.' " *Rutherford Food*, 331 U.S. at 728-729 (quoting *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947)). In contrast, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947); see also *Alamo Found.*, 471 U.S. at 301.

To distinguish between employees and independent contractors, the courts have consistently applied a number of criteria derived from *Silk*, 331 U.S. at 716, and *Rutherford Food*, 331 U.S. at 729—degree of control, opportunity for profit and loss, investment in facilities, permanency of relation, skills required, and interdependence of tasks. See, *e.g.*, *Brock* v. *Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987), cert. denied, No. 87-153 (Nov. 2, 1987); *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-1328 (5th Cir. 1985); *Castillo* v. *Givens*, 704 F.2d 181, 190 (5th Cir.), cert. denied, 464 U.S. 850 (1983); *Donovan* v. *Dial America Marketing, Inc.*, 757

F.2d 1376, 1382 (3d Cir.), cert. denied, 474 U.S. 919 (1985); *Donovan* v. *Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). Determination of employment status, however, "does not depend on * * * isolated factors but rather upon the circumstances of the whole activity" (*Rutherford Food*, 331 U.S. at 730). And, although the question of employment status depends on the individual facts of each case, the ultimate determination of whether a worker is an employee is a question of law. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

2. The court of appeals correctly applied these widely accepted criteria and governing principles in holding, as a matter of law, that the migrant laborers who harvest petitioners' pickle crop are "employees." The undisputed material facts established that petitioners exercise exclusive control over production and distribution of their pickle crop. The migrants play no role in cultivating the fields, planting the seed, irrigating, fertilizing, or applying pesticides; petitioners perform all of those tasks. Similarly, petitioners alone select the processors to whom their pickles are sold and execute pre-season agreements that establish their selling prices. The migrants' only task is to pick the pickles and transport them to petitioners' sorting and grading stations. During the harvest season, the migrants live in housing supplied, free of charge, by petitioners, and they use petitioners' equipment (pails, sacks, trucks) to perform their work. Although their earnings are wholly dependent on the sale of the pickles, the migrants have no say in setting their sales price or selecting the processors to whom they will be sold. In addition, the terms of petitioners' "contracts" with the migrants are set by

petitioners. Petitioners do not negotiate separately with individual migrant families as to basic terms, nor do the terms of the agreements vary from year to year.

Like the employee meat boners in *Rutherford Food*, the migrants essentially do "a specialty job in the production line" (331 U.S. at 730) and their work is "a part of the integrated unit of production" (*id.* at 729). Also like the *Rutherford Food* boners, whose "profits * * * depended upon the efficiency of their work" (*id.* at 730), the pickers' earnings depend in some part on their level of skill in selecting the best size cucumber to pick. They are not self-employed or independent, however, "selling their products * * * for whatever price they can command." *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961). Rather, the compensation they receive for the pickles they pick is based on the prices set by petitioners' pre-season agreements with the processors. Their work is therefore "more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (*Rutherford Food*, 331 U.S. at 730).[7]

In sum, in light of the "circumstances of the whole activity" (331 U.S. at 730), it is plain that the migrant pickle pickers are economically dependent on petitioners, and the court of appeals thus correctly held that they are employees entitled to the protections of the FLSA.

3. It is possible that the Seventh Circuit would have reached a different result than that reached by the Sixth

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[7] That petitioners' compensation system may require the migrants to accept some potential risk of lost earnings because of, for example, a poor crop, does not alter the fundamental piecework nature of the system or convert the migrants into independent contractors. See, *e.g.*, *Brock* v. *Mr. W Fireworks*, 814 F.2d at 1050; *Usery* v. *Pilgrim Equip. Co.*, 527 F.2d 1308, 1313 (5th Cir.), cert. denied, 429 U.S. 826 (1976); *Donovan* v. *Sureway Cleaners*, 656 F.2d at 1372.

Circuit in *Donovan* v. *Brandel, supra*, where migrant pickle pickers were held to be employees rather than independent contractors. Nevertheless, it is far from clear that action by this Court is necessary in order to reconcile the two decisions. The two cases are not factually identical.[8] And, as the court below noted, *Brandel* was carefully limited to its facts and, even within its own circuit—at the apparent invitation of the *Brandel* court itself (736 F.2d at 1120 n.11)—has been distinguished in another case involving migrant pickle pickers (Pet. App. 14a, citing *Donovan* v. *Gillmor*, 535 F. Supp. 154 (N.D. Ohio),

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[8] In *Brandel*, the court was impressed with the fact that "[t]he Secretary cites cases which have found other farm laborers to be employees, but none which have presented a finding of lack of a permanent relationship" (736 F.2d at 1117), apparently suggesting that it might well have reached a different result had a greater showing of permanence been made. The court's determination of a lack of permanent relationship, in turn, was based on the facts that only 40-50% of the migrants returned annually and that 24 of a selected 36 families had harvested pickles for only one year (*ibid.*). Those numbers contrast with the comparable statistics admitted by petitioners, *i.e.*, that 80% of the migrants return each year (Pet. App. 80a (20% annual turnover)) and that the average family works three to four years (*ibid.*). In addition, in *Brandel* there was no state-law or contractual obligation to treat the migrants as employees rather than independent contractors, whereas in this case Wisconsin law requires, and petitioners sign, contracts imposing such obligations. Although petitioner Michael Lauritzen claims that he is not bound by those contracts (Pet. App. 64a-65a), we are unaware of any basis on which legal obligations can be so casually cast aside. The vagaries of state law ordinarily will not control the construction of a federal statute, but it would be ironic in the extreme if the migrant farm workers in this case were to be deemed employees under state law yet were held to fall outside the definition of "employee" under a federal statute in which "the term 'employee' ha[s] been given 'the broadest definition that has ever been included in any one act.' " *Rosenwasser*, 323 U.S. at 363 n.3 (quoting 81 Cong. Rec. 7657 (1937) (remarks of Sen. Hugo Black)).

appeal dismissed, 708 F.2d 723 (6th Cir. 1982) (Table), aff'd on reconsideration, No. C79-163 (N.D. Ohio Dec. 2, 1986)).

Furthermore, unlike petitioners (Pet. 25-29), we believe that any disagreement that might persist does not warrant review by this Court. First, as petitioners concede (Pet. 26-28), the Sixth Circuit applied the very same legal principles and specific criteria as the court below. Compare Pet. App. 10a-12a with 736 F.2d at 1116-1117. Thus, the uniformity among the courts of appeals regarding the controlling legal principles (see pp. 11-12, *supra*) remains undisturbed. The type of divergence in result on a narrow issue (the status of migrant pickle pickers) manifested here, especially given the broad consensus on the controlling legal rules, simply does not amount to the type of intolerable conflict that needs resolution by this Court.

Moreover, the *Brandel* result stands alone among the decisions of courts of appeals regarding migrant farm workers. See, *e.g.*, *Beliz* v. *W.H. McLeod & Sons Packing Co.*, *supra*; *Castillo* v. *Givens*, *supra*; *Real* v. *Driscoll Strawberry Associates, Inc.*, *supra*; *Hodgson* v. *Okada*, 472 F.2d 965, 969 (10th Cir. 1973). In our view, it is unlikely that *Brandel* will be followed in other circuits or that it will have any significant effect on the courts' ability to resolve questions of employment status in future migrant workers' litigation under the FLSA. Thus, any conflict that exists is neither sufficiently fixed, nor of sufficient magnitude or impact, to warrant review by this Court at this time.

4. The court of appeals correctly concluded that the district court had properly resolved the employment status of the migrant farm workers on summary judgment. Petitioners' contention to the contrary (Pet. 7-24) is without merit. The court of appeals properly rejected petitioners' assertion, repeated here, that their disagreement with

some of the facts on which the district court relied necessitated a trial. As the court of appeals explained (Pet. App. 10a), the facts petitioners disputed in their various affidavits were not " 'outcome determinative under the governing law' " as is required to preclude summary judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment").[9] Summary judgment cannot be avoided by asserting "the mere existence of *some* alleged factual dispute" (*id.* at 247 (emphasis in original)).

Petitioners' burden was to "come forward with 'specific facts showing there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As the court of appeals held (Pet. App. 8a-9a, 20a), petitioners simply did not carry that burden. Petitioners supported their opposition to the Secretary's motion for summary judgment and their own motion for relief from judgment with two affidavits from petitioner Michael Lauritzen and two signed collectively by several migrant laborers (*id.* at 54a-80a). As the court of appeals noted, these affidavits did not create any disputed *material* facts under the governing law, but in all material respects were in agreement with the facts necessary to dispose of the motion for summary judgment (*id.* at 9a).

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[9] Petitioners argue (Pet. 22-23) that the requirement of demonstrating disputes over "outcome-determinative" facts in order to withstand a summary judgment motion should not apply in cases in which courts must balance several factors, none of which alone is conclusive. Petitioners cite no support for the novel proposition that the mere lack of any single dispositive factor means that a party can require a district court to hold a trial in order to resolve factual disputes that, whatever their resolution at trial, would have no effect on the court's judgment.

In other words, the only purported disputes reflected by the affidavits would not have made a difference under the governing law, even if accepted as true, and hence did not bar an award of summary judgment. For example, the affiants averred that at all times they considered and intended that the migrants were independent contractors, not employees (Pet. App. 55a, 67a). But subjective intent regarding employment status is plainly irrelevant, for "the purposes of the Act require that it be applied even to those who would decline its protections." *Alamo Found.*, 471 U.S. at 302. Indeed, here as in *Alamo Found.*, to allow an exception for workers willing to testify that they worked as independent contractors rather than employees would impermissibly enable employers "to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act" (*ibid.*). Similarly, whether migrants "select" or are "assigned" housing (compare Pet. App. 64a, 73a, with *id.* at 7a, 47a), or "select" or are "assigned" the acreage they harvest (compare *id.* at 55a-56a, 73a, with *id.* at 7a, 48a), is manifestly immaterial to the question whether they are employees under the FLSA, given, among other things, that petitioners owned both the land and the housing and exercised "pervasive control over the operation as a whole" (*id.* at 15a).[10]

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[10] By the same token, even if petitioners are correct that the district court erred in stating that the migrant laborers are paid regardless of whether the pickles are sold (Pet. 15-16), that fact would not alter the result. That fact relates to the "risk of loss" criterion, and the court of appeals correctly recognized that "risk of loss" refers to investment loss, not "reduction in earnings due to a poor pickle crop" (Pet. App. 16a). Moreover, as discussed above, petitioners' compensation system, which imposes a potential risk on the migrants, does not convert the employees into independent contractors. Nor is it significant

Moreover, under the governing law, quibbles about the enhanced proficiency of pickle pickers over time, and their corresponding increased earnings capacity (Pet. 12), do not create any material factual dispute regarding whether the skill required of the migrant laborers is the type of skill customarily associated with the work of independent contractors. However the differing accounts of the migrants' skill level might be resolved, this case remains like *Rutherford Food,* in that the migrants' work (like that of the boners in *Rutherford Food*) is routine. Although their "profits * * * depend upon the efficiency of their work, it [is] more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (331 U.S. at 730). See also *Usery* v. *Pilgrim Equip.*, 527 F.2d at 1314-1315 (skill required of laundry outlet operators is not indicative of nonemployee status because the work, though requiring industry and efficiency, is routine, and employer controls all "major components open to initiative—advertising, pricing, and most importantly the choice of cleaning plants with which to deal"); *Donovan* v. *Sureway Cleaners*, 656 F.2d at 1372 (rejecting argument that the linkage between profits and a worker's initiative and business acumen indicates skills characteristic of an independent contractor when "[n]either long training nor highly developed skills are required" to perform task of

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that, without migrant laborers, the pickles would not "rot on the vine," but would instead be harvested by an inferior method resulting in the recovery of greatly reduced (but not zero) payments to petitioners (Pet. 15; see Pet. App. 73a-74a; 80a). There is no dispute that harvesting the pickle crop is an integral part of petitioners' business, and petitioners themselves acknowledge that "[p]ickles grown for the process market are, of necessity, hand harvested" (Pet. App. 60a). Thus, there is no genuine issue of material fact with respect to whether the migrants' service is an integral part of petitioners' business.

running a laundry outlet and "all major aspects of the business open to initiative * * * are controlled by" the company).[11] Finally, the affiants' bald denials of certain facts or conclusions (*id.* at 65a) plainly do not discharge their burden under the applicable summary judgment standard. See *Anderson*, 477 U.S. at 256 (nonmoving party may not rest on mere denials but must set forth specific facts showing a genuine issue for trial). In sum, petitioners failed to come forward with facts that would produce a different result under the governing law. Thus, summary judgment was properly granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Thus, as Judge Easterbrook correctly observed, "[t]he parties dispute whether 'quickly' [as used to describe the amount of time necessary to learn the pickle picker's occupation] means days or only minutes, but the difference is unimportant for current purposes" (Pet. App. 34a n.5).

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